In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1140

ESTELLE LATTA, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

In March 1963 the Securities and Exchange Commission filed a complaint in the United States District Court for the Northern District of California seeking to enjoin petitioner from selling unregistered securities and from making false and misleading statements in connection with such sales, in violation of the Securities Act of 1933 (C.T. 7, 36).[1] After petitioner had filed an answer denying the violations (C.T. 14), both parties moved for summary judgment (C.T. 15, 29,

[1] "C.T. " refers to the transcript of record on appeal. "D. " refers to petitioner's deposition which appears as item number 42 in the record on appeal. "T. " refers to the transcript of testimony which appears as item number 43 in the record on appeal.

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37). Attached to the Commission's motion were various affidavits, a transcript of testimony given at a Commission investigation and a deposition given by petitioner (C.T. 1, 4, 18, 21, D. 1–94, T. 1–60). Petitioner filed no affidavits or other factual material in support of her motion or in opposition to the Commission's motion; she relied on material that the Commission had submitted (C.T. 29, 37).

The district court held that there was no dispute as to any material fact and that the Commission was entitled to the relief it sought, and entered a permanent injunction (C.T. 28–30, 34–48). The court of appeals affirmed *per curiam* (Pet. App. 1–2; 356 F. 2d 103).

The documents which the Commission submitted in support of its motion for summary judgment established the following facts:

Petitioner claims to be an heir of Mark Hopkins (D. 25, 32–33), who died in 1878 (D. 89). For many years she has been engaged, alone and with others (D. 13–14), in securing from purported heirs of Mark Hopkins powers of attorney which authorized her to act as attorney-in-fact to recover and redistribute the Hopkins estate—based upon the alleged invalidity of the 1883 decree of distribution of the estate (D. 27–28, 89–91). To raise money to accomplish this objective (D. 45, T. 8), petitioner sold (D. 13, 43) to purported heirs of Mark Hopkins and to others (D. 43, 64, C.T. 19, T. 10, 23) so-called "Contract[s] in Event of Recovery" (D. 5, C.T. 20, T. Exhibits 1–9, 11–12). Petitioner also supplied such contracts signed in blank (D. 4–5, 8–9, 45, C.T. 4–6, T. 16) to other

persons who sold them on her behalf to purported heirs and to members of the public who claimed no relationship to Mark Hopkins (D. 16–18, 44–45, 50–58, 62, 64, 68, 76, C.T. 1–6, 18–19, T. 23, 25–26); petitioner received the proceeds from these sales (D. 45, 56–57, 62, C.T. 4–6, T. 3A, 12–14, 29). Petitioner represented to purchasers that they became heirs through buying a contract (D. 64, C.T. 19).

Each such contract—priced at $100—assigns to the purchaser a 1/21,000th interest in the Hopkins estate (C.T. 20, 39, T.-Exhibit 10), which the purchaser is to receive upon the redistribution of the estate if petitioner succeeds in invalidating the 1883 distribution; the distribution to the purchasers of such contracts is to be made prior to any distribution to the legal heirs (D. 68, 74–77, T. 50–51) whose powers of attorney petitioner holds (D. 68). Petitioner has obtained powers of attorney from more than 500 purported heirs (D. 12), located throughout the country (D. 44), who are unknown to each other (D. 46–47).

Petitioner and others who acted on her behalf have sold the contracts through the mails and in interstate commerce (D. 53–54, 56–57, C.T. 4–5, T. 3A–4, 5, 13–14, 38, 40, 43), without a registration statement with respect thereto being filed with the Securities and Exchange Commission (C.T. 26). In selling these contracts petitioner represented that the Hopkins estate can be recovered [2] (D. 35–36, 68, 74–79, 89–91, C.T. 1, 4–5, 18–19, T. 19–20, 29, 56). In 1949, however, the Court of Appeals for the Ninth Circuit, in affirming

[2] According to petitioner "[e]verybody will be taken care of when the right time comes" (D. 79).

the dismissal of an action by petitioner (D. 26–28) and other alleged heirs seeking to vacate the 1883 decree of distribution of the Hopkins estate, held that the decree was valid and that the claims asserted were barred by the statute of limitations and by gross laches. *Latta* v. *Western Investment Co.*, 173 F. 2d 99, certiorari denied, 337 U.S. 940. The district court found (Fdg. C 4, C.T. 42) that petitioner "has continued her solicitations of investments in the Mark Hopkins Estate for more than fifteen years after the court of appeals barred any reasonable expectation that her quest for treasure through litigation will end in anything except disappointment."

The district court properly granted summary judgment in favor of the Commission, and the petition presents no question warranting further review.[3] The facts set forth above establish (1) that petitioner sold unregistered securities and (2) that in making such sales she misrepresented that the original distribution of the Hopkins estate could be overturned.

Under the principles enunciated in *Securities and Exchange Commission* v. *C. M. Joiner Leasing Corp.*, 320 U.S. 344, and *Securities and Exchange Commission*

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[3] Petitioner contends (Pet. 5–7) that in granting the Commission's motion for summary judgment the district court applied an erroneous test, *i.e.*, whether the Commission's proofs contained sufficient competent evidence to establish a *prima facie* case. She relies upon a single paragraph in the court's order that is taken out of context (Pet. 6). When the order is read in its entirety (C.T. 28–30), however, it is clear that the words "prima facie case" do not refer to the question whether there are disputed issues of fact, but rather to the question whether the Commission is entitled to judgment on the basis of the undisputed facts.

v. *W. J. Howey Co.*, 328 U.S. 293, the interests which petitioner sold were investment contracts and hence securities under the Securities Act of 1933. Here, as in *Howey*, the purchaser of a contract "invest[ed] his money in a common enterprise and [was] led to expect profits solely from the efforts of the promoter or a third party * * *" (328 U.S. at 299). The common enterprise was petitioner's endeavor to upset the 1883 distribution of the Hopkins estate and then to distribute that estate to the purchasers of the contracts. As the district court pointed out (Fdg. B 1, C.T. 40), the "value, if any, of the contracts rests upon the ability of the defendant, as the promoter of this litigious enterprise, to establish in the courts the claims of the alleged heirs of Mark Hopkins and the contract claimants and to secure an accounting and redistribution of the estate. Unless the defendant is successful in that undertaking the contracts will remain scraps of worthless paper."

Contrary to petitioner's contention (Pet. 19), her activities were not limited to "family cooperative efforts to preserve legal rights," but involved the participation of members of the public in a risk-sharing enterprise. Petitioner did not restrict the sale of contracts to relatives of Mark Hopkins, but sold them to a broader class of purchasers, many of whom had no relationship to him. Since these securities were not registered with the Commission (Fdg. B 2, C.T. 41), the uncontradicted facts establish that petitioner violated the Act in selling them in interstate commerce and through the mails.

The facts also showed that petitioner made a material misrepresentation in selling the securities. Although petitioner stated that the Hopkins estate could be recovered, she was well aware, as the result of the 1949 decision of the Ninth Circuit in the *Western Investment Co.* case, in which she was the plaintiff, that the validity of the 1883 decree had been judicially upheld and that her attempts at this late date to overturn that decree were barred by the statute of limitations and laches. In these circumstances, her claim that the Hopkins estate could be recovered constituted a material misrepresentation and, *a fortiori,* the omission "to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading," in violation of the antifraud provisions in Section 17(a) of the Securities Act of 1933 (15 U.S.C. 77q(a)).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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